

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

OCT 18 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Review of the Commission's Regulations)	MM Docket No. 91-221
Governing Television Broadcasting)	
)	
Television Satellite Stations Review of)	MM Docket No. 87-8
Policy and Rules)	

To: The Commission

PETITION FOR CLARIFICATION OR RECONSIDERATION

CBS Corporation ("CBS"), by its attorneys, hereby requests clarification or reconsideration of the new radio-television cross ownership rules adopted by the Commission in its Report and Order in the above-captioned proceeding.¹ *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket Nos. 91-221, 87-8 (FCC 99-209) (released August 6, 1999) ("Report & Order"). Specifically, CBS requests that the Commission clarify that the new rules (to be codified at 47 C.F.R. § 73.3555(c)) (the "Radio-Television Cross Ownership Rule") do not apply to a radio station in a proposed radio/television combination which is licensed to a community located outside of the television station's Nielsen Designated Market Area ("DMA").

As discussed below, it appears that the Report & Order unintentionally expands the scope of the Radio-Television Cross Ownership Rule so that the rule as drafted applies to radio/television combinations where the radio and television stations are located in separate

¹ The Commission's Report & Order was published in the Federal Register on September 17, 1999. Therefore, this Petition is timely filed.

markets. As a result, the new rule would make certain existing radio/television combinations unlawful. To avoid this unintended result, CBS proposes herein a modification to the Commission's Rules clarifying that the Radio-Television Cross Ownership Rule does not apply to radio stations located outside the DMAs of television stations.

I. The New Radio-Television Cross Ownership Rule Should Not Apply to Stations Located in Separate DMAs.

CBS seeks clarification of a narrow — yet significant — aspect of the new Radio-Television Cross Ownership Rule that could have the unintended effect of unduly limiting common ownership of certain radio and television stations. Specifically, the new rule as drafted appears to treat broadcast stations located in separate DMAs as if they are located in the same market. It appears to CBS that this result is unintended, because the new ownership rules in general utilize “real world” definitions of markets, in lieu of market definitions based on amalgamation of predicted and therefore somewhat hypothetical coverage contours.

The apparent reason for the inconsistency is that the Radio-Television Cross Ownership Rule continues to be “triggered” when the Grade A contour of a television station encompasses the community of license of a radio station, or when the 1 mV/m contour of an FM station or the 2 mV/m contour of an AM station encompasses the community of license of a television station. Report & Order at n.159; 47 C.F.R. § 73.3555(c)(1). Thus, the rule may be triggered where the relevant coverage contour of a station in one DMA encompasses the community of license of another station in a separate DMA. As drafted, the new Radio-Television Cross Ownership Rule — unlike the waiver policy pursuant to which existing

combinations were created — appears to treat such radio-television combinations as belonging to the same market.

The Baltimore and Washington, D.C. markets provide a prime example of how the new rule could inadvertently limit common ownership of stations. CBS is licensee of WJZ-TV in Baltimore. The station's Grade A contour encompasses the communities of license of eight CBS radio stations in the Baltimore DMA and three CBS radio stations in the Washington, D.C. DMA, WARW(FM), Bethesda, Maryland, and WPGC AM/FM, Morningside, Maryland. Both Bethesda and Morningside are suburbs of Washington. CBS commonly owns WJZ-TV and these eleven radio stations pursuant to four separate waivers of former Section 73.3555(c) of the Commission's rules (the "One-to-a-Market Rule").² In granting these waivers, the Commission treated the Washington and Baltimore stations as being located in separate markets for purposes of the One-to-a-Market Rule. Under the new Radio-Television Cross Ownership Rule, however, which apparently aggregates stations regardless of DMA, CBS would be required to divest four of these stations in order to comply with the new common ownership limit of no more than eight stations (*e.g.*, one television and seven radio stations) in any one market. This divestiture would be necessitated despite the fact that three of the stations are located inside the Washington DMA. If the Washington-area stations are not aggregated with the Baltimore stations — that is, if the Washington stations

² See *Shareholders of American Radio Systems Corporation, Transferor, and CBS Corporation, Transferee*, 13 FCC Rcd 12430 (Chief, Mass Media Bureau) (1998); *WHFS, Inc. (Assignor) and CBS, Inc. (Assignee)*, 12 FCC Rcd 3965 (1997); *Stockholders of Infinity Broadcasting Corporation (Transferor) and Westinghouse Electric Corporation (Transferee)*, 12 FCC Rcd 5012 (1996); *CBS Inc. (Transferor)/Westinghouse Electric Corporation (Transferee)*, 11 FCC Rcd 3733 (1995).

are considered a part of a separate market — CBS would be required to divest only one station (ignoring for these purposes any “grandfathering”).

The aggregation of the Baltimore and Washington stations into one market is inconsistent with the philosophy of the new Radio-Television Cross Ownership Rule. The industry’s ratings services — Nielsen Media Research and The Arbitron Company — recognize the distinct nature of Baltimore and Washington and, accordingly, place the stations in separate television and radio markets. As a practical matter, the Washington-area stations at issue do not negatively affect diversity or competition within the Baltimore market, nor does the Baltimore television station affect diversity or competition in Washington.

The same issue will arise in Sacramento in connection with the proposed merger of CBS into Viacom Inc. (“Viacom”). Viacom currently owns television station KMAX-TV in Sacramento. Infinity Broadcasting Corporation (“Infinity”), a subsidiary of CBS, owns seven radio stations licensed to Sacramento or other communities in the Sacramento DMA. Because the relevant contours of these seven radio stations encompass the city of Sacramento, the Radio-Television Cross Ownership Rule will be triggered by the proposed merger. In addition, two other stations owned by Infinity, KFRC(AM) and KCBS(AM), both licensed to San Francisco, also would be included in the combination because the 2 mV/m contour of each station appears to encompass Sacramento. San Francisco, however, is located in the San Francisco-Oakland-San Jose DMA, which is distinct from the Sacramento-Stockton-Modesto DMA. If the two San Francisco stations are included in the Sacramento combination, Viacom would control after the consummation of the proposed merger one television station and nine radio stations (seven radio stations in the Sacramento market and two radio stations in the San

Francisco market). Accordingly, Viacom would be required to divest two radio stations to come into compliance with the Radio-Television Cross Ownership Rule in Sacramento. If the two San Francisco AM stations were excluded from the Sacramento combination (as they should be), the proposed combination of one television station and seven radio stations would be in complete compliance with the new rule.

To make the Baltimore/Washington, Sacramento/San Francisco and other similarly situated combinations comport with the philosophy of the new rule, the Commission should modify the Radio-Television Cross Ownership Rule to make clear that the rule does not apply to stations licensed to communities in separate DMAs. To this end, CBS proposes that the Commission add the following paragraph to its rules:

73.3555(c)(4) A radio station whose community of license is located outside the DMA of an existing or proposed commonly owned TV station with which the radio-television cross ownership rule is triggered pursuant to paragraph (c)(1) of this section does not count toward the number of stations an entity may directly or indirectly own, operate, or control for purposes of paragraph (c)(2) of this section.

By adopting this modification, the Commission would bring the Radio-Television Cross Ownership Rule in line with other provisions of the new broadcast ownership rules that eschew hypothetical coverage contours in favor of “real world” assessments when determining markets. Specifically, the new TV duopoly rule, which permits common ownership of television stations located in different DMAs without regard to Grade B contour overlap, recognizes that Nielsen DMAs are a better measure of actual television viewing patterns than contour overlap. As the Commission has previously noted, DMAs reliably gauge the economic marketplace in which broadcasters, program suppliers and advertisers buy

and sell their services and products. See Report & Order at ¶47. Logically, DMAs should also determine the relevant market for purposes of the new Radio-Television Cross Ownership Rule, rather than a signal contour that may encompass a station's city of license but that does not necessarily reflect the station's true market. The modification proposed by CBS reflects this logic.

The Radio-Television Cross Ownership Rule as drafted could also lead to anomalous results vis-à-vis the new broadcast ownership rules in other ways. Under the new TV duopoly rule, for example, CBS could own two television stations in both the San Francisco and Sacramento markets without regard to contour overlap because the markets are recognized as being distinctly separate. In contrast, the new Radio-Television Cross Ownership Rule would, under the circumstances described above, treat two of CBS's San Francisco radio stations as part of the same market as Sacramento radio and television stations. This result is inconsistent with the new TV duopoly rule and squarely at odds with the Department of Justice's conclusion that television and radio stations serve separate markets. Adoption of the modification proposed herein by CBS would eliminate these inconsistencies.

Treating stations licensed to communities in separate DMAs as being in different markets would not only reflect marketplace realities, it would also be consistent with past Commission practice that created radio/television combinations. In granting waivers of the One-to-a-Market Rule, the Commission repeatedly held that the relevant market for a station is the market in which that station is located. See, e.g., *AT&T Corporation (Transferor) and LIN Holdings Corporation (Transferee)*, 13 FCC Rcd 4633 (Chief, Mass Media Bureau) (1998) (New York is relevant market for purposes of the One-to-a-Market Rule for stations

located in New York DMA notwithstanding the fact that the communities of license of these stations are encompassed by Grade A contour of a commonly owned television station located in the Hartford-New Haven DMA); *Media/Communications Partners Limited Partnership*, 10 FCC Rcd 8116 (1995) (Detroit, Michigan, Toledo, Ohio, and Flint, Michigan, deemed separate markets for purposes of the One-to-a-Market Rule notwithstanding the fact that the 2 mV/m contour of a Detroit AM station encompasses both Toledo and Flint, the communities of license of two television stations to be commonly owned); *Pyramid Communications, Inc.*, 10 FCC Rcd 4274 (1995) (Boston deemed the relevant market where the Grade A contour of a Providence, Rhode Island television station encompassed Boston, Massachusetts, the community of license of a commonly-owned radio station). In fact, the Commission specifically treated CBS's WARW-FM as part of the Washington, D.C. — and not the Baltimore — market, in granting CBS a waiver of the One-to-a-Market Rule notwithstanding the fact that the Grade A contour of CBS's Baltimore station WJZ-TV encompasses WARW's community of license, Bethesda. *See CBS Inc. (Transferor)/Westinghouse Electric Corporation (Transferee)*, 11 FCC Rcd 3733 at ¶ 73 (1995) ("Because Bethesda lies within the Washington, D.C. market, evaluation of Westinghouse's [One-to-a-Market rule] waiver request must focus on that market"). By modifying the Radio-Television Cross Ownership Rule in the manner proposed by CBS, the Commission would simply be recognizing its previous determination that a DMA is the best measure of a station's relevant market.

II. The Comments of CBS in Response to the Public Notice Are Incorporated Herein by Reference.

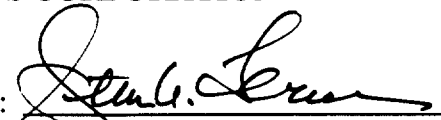
On October 4, 1999, CBS filed comments in response to the Commission's *Public Notice* in the instant proceeding seeking comment on the proposed procedures for processing applications filed pursuant to the Commission's new local broadcast ownership rules. *See* Comments of CBS Corporation on "Tie-Breaker" Proposal, MM Docket No. 91-221, MM Docket No. 87-8 (filed October 4, 1999). On October 12, 1999, CBS submitted Reply Comments. *See* Reply Comments of CBS Corporation on "Tie-Breaker" Proposal, MM Docket No. 91-221, MM Docket No. 87-8 (filed October 12, 1999). To the extent that the Commission may deem these comments to be outside the scope of the *Public Notice*, CBS requests that the comments be incorporated herein by reference and treated as a petition for reconsideration of the Report & Order.

III. Conclusion

For the reasons set forth in Section I above, the Commission should modify the new Radio-Television Cross Ownership Rule to make clear that it does not apply to stations located in separate DMAs.

Respectfully submitted,

CBS CORPORATION

By: 
Steven A. Lerman
Meredith S. Senter, Jr.
Philip A. Bonomo

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, NW, Suite 600
Washington, DC 20006
(202) 429-8970

October 18, 1999

Its Attorneys